the respondent to the applicant, in the previous action which would bar the present application.

The plea of *res judicata* therefore fails.

I shall hear the summons.

Order accordingly.

Solicitors: *Kamala Devi & Co.; Stanley Ponniah.*

HAJI MOHAMED PAIMAN v. PUBLIC PROSECUTOR

[A.Cr.J. (Azmi J.) July 12, 1965]

[J.B. — Muar Criminal Appeal No. 2 of 1965]

Criminal Law and Procedure — Trial — Sanction — Sanction produced only at trial of accused — Proceedings nullity — Immigration Ordinance, 1959, ss. 6(1)(c), 57 and 58(2).

The appellant had been charged with the offence of knowingly harbouring an illegal immigrant, an offence under section 6(1)(c) of the Immigration Ordinance, 1959. Section 58(2) of the Ordinance provided that no prosecution shall be instituted in respect of an offence under the Ordinance without the sanction in writing of the Controller, of the Public Prosecutor or his deputy. The appellant was originally charged in court on March 10, 1964, but a written saction was not produced till the date of the trial on July 25, 1964. The sanction was signed on July 23, 1964.

Held: the written sanction should have been produced when the appellant was charged in court and as this was not done the proceedings were a nullity and the conviction must be set aside.

Cases referred to:—

(1) *Thorpe* v. *Priestnall* [1897] 1 Q.B. 159.

(2) *Tengku Abdul Aziz* v. *Public Prosecutor* [1951] M.L.J. 185.

CRIMINAL APPEAL.

Dato' David Marshall for the appellant.

Hamzah bin Mohamed Salleh (Deputy Public Prosecutor) for the respondent.

Azmi J.: The appellant was convicted on the following two charges:

(1) "That you sometime in the month of January, 1964 at Parit Perepat, Rengit did knowingly harbour a person, an illegal immigrant namely Atan bin Bujang whom you had reasonable grounds for believing to have acted in contravention of section 6(1)(c) of the Immigration Ordinance No. 12/59, thereby committing an offence under section 56(1)(d) of the Immigration Ordinance and punishable under section 57 of the said Ordinance."

(2) "That you sometime in the month of January, 1964 at Parit Perepat, Rengit did knowingly harbour a person, an illegal immigrant namely Adnan bin Omar whom you had reasonable grounds for believing to have acted in contravention of section 6(1)(c) of the Immigration Ordinance No. 12/59, thereby committing an offence under section 56(1)(d) of the Immigration Ordinance and punishable under section 57 of the said Ordinance."

and was sentenced to a fine of $1,000 on each charge or, in default, 3 months' imprisonment.

There are several grounds of appeal against the conviction but, with the agreement of the learned Deputy Public Prosecutor, Dato' Marshall proceeded firstly on one ground only. That ground reads as follows:

"There was a miscarriage of justice in that

b) the prosecution on the said charges was instituted without any sanction in contravention of explicit statutory prohibition."

The relevant statutory provision in that respect is section 58(2) of the Immigration Ordinance which reads as follows:

"(2) No prosecution shall be instituted in respect of any offence against this Ordinance or any regulation made thereunder without the sanction in writing of the Controller or of the Public Prosecutor or his Deputy."

There is a proviso to this subsection and it reads:

"Provided that nothing herein shall prevent any police officer or immigration officer from exercising his powers to arrest or detain any person under the provisions of this Odinance."

The facts of this case would show that the appellant was arrested on the 10th of March, 1964, and was brought to the court the same day, where the two charges were read to him and he claimed trial.

The trial, after several adjournments, had actually commenced on 25th July 1964. At the trial the learned Legal Adviser, who appeared for the prosecution, produced a sanction under section 58(2). That sanction was signed by him on 23rd July, 1964.

Dato' Marshall said that the sanction was given about 4½ months after the appellant was first charged on the 10th of March, 1964. At that time no sanction was produced and, therefore, the whole proceedings before the learned president had been a nullity. He cited me the case of *Thorpe* v. *Priestnall* [1] and the local case of *Tengku Abdul Aziz* v. *Public Prosecutor*.[2]

In the case of *Thorpe* v. *Priestnall*, the appellant was convicted under the Sunday Observation Act, 1676. The Sunday Observance Prosecution Act, 1871, provides that no prosecution shall be instituted for any offence under the Act of 1676 except by or with the consent in writing of the chief officer of police of the police district in which the offence is committed.

The information was laid on the 6th July, 1896, for an offence the appellant was alleged to have committed under the Act on July the 5th, 1896. The summons was issued on July the 6th calling on the appellant to appear on July the 15th. The summons was served personally on July the 7th. The chief constable gave his verbal consent when it was asked on July the 6th, but it was not until the next day that he signed the written sanction. It was held

that the prosecution was instituted when the information was laid on July the 6th, and therefore was not instituted with the consent in writing of the chief constable and the conviction was bad.

Wills J. at page 162 said:

"But where there is a prosecution, I cannot see any reason why the laying of the information (which started it) is not the commencement of the prosecution; and I certainly think this has been the meaning of the phrase commonly accepted in the profession."

Wright J. at page 163 said:

"In *Rex* v. *Willace*, 'the judges, at a conference, unanimously held that the information and proceeding before the magistrate was the commencement of the prosecution, within the meaning of the Act,' 8 & 9 Will. 3, c. 26, s. 9, which provided that no prosecution should be made for any offence against that Act, unless such prosecution be commenced within three months next after such offence committed. The case of *Reg.* v. *Brooks* is to the same effect, though not so satisfactory, for there the fifteen judges, after holding that the prosecution was commenced by the information and warrants to apprehend, appear to have added the words, 'or at all events by the apprehension of the prisoners.' The case of *Rex* v. *Willace*, however, is a sufficient authority for the view which we have adopted."

In the case of *Tengku Abdul Aziz* v. *Public Prosecutor*, the provisions of section 129(v) were considered. That sub-section provides "that no sanction given under the provisions of sub-section (i) of that section shall remain in force unless acted upon within one month from the date on which it was given." The sanction was granted on 11th November, 1950, and the police applied for a summons on 11th December, 1950, but the magistrate did not give his direction that the summons should issue until the 2nd January, 1951. The Court of Appeal said in its judgement, "In our opinion, the sanction is acted upon when the Public Prosecutor applies to the court for the issue of process, and in this case that was done within the required period."

Dato' Marshall said that ordinarily sanctions should have been produced when the information is laid before the magistrates or when the learned Deputy Public Prosecutor applies for a summons, and went on to say that under section 58(2) the arrest or detention of a person could be exercised without any written sanction, such arrest or detention being one of two things which initiated or amounted to an institution of proceedings. The other occasion would be the production of the accused before the court and charged with the offence.

I would say that the arrest of the accused and his detention having been allowed by section 58(2) without a written sanction, the written sanction should have been produced on the 10th of March, 1964, when the accused was charged. In this case the appellant claimed trial, but if he had pleaded guilty the court could have proceeded to convict him and would have therefore done so without any written sanction.

I would, therefore, set aside the conviction and if the fines have been paid, order that they be returned to the appellant.

Conviction set aside.

JEREMIAH v. LEE YEW KWAI

[Privy Council (Lord Hodson, Lord Pearce and Lord Wilberforce) July 27, 1965]

[Privy Council Appeal No. 46 of 1964]

Negligence — Contributory negligence — Apportionment of blame for accident — Finding of trial judge — Not possible for appellate court to intervene and substitute fresh finding.

Practice and Procedure — Appeal — Apportionment of blame for accident — Finding of trial judge — Intervention.

In this case the trial judge had found that the plaintiff was guilty of contributory negligence and therefore awarded him only 50% of the damages. An appeal to the Federal Court was dismissed and on further appeal to the Privy Council,

Held: this was purely a question of deciding what is the right apportionment, if any, of blame on two persons when they were suddenly involved in a traffic emergency and it would not be possible for an appellate court to intervene and substitute a fresh finding instead of that which was found by the learned trial judge.

PRIVY COUNCIL.

Denis Murphy and *F. Daly* for the appellants.

J. D. May Q.C., and *Anthony Allen* for the respondents.

The judgment of the Lords of the Judicial Committee of the Privy Council was delivered by,

Lord Pearce: This is an appeal by the plaintiff from an order of the Federal Court of Malaysia dismissing the plaintiff's appeal from an order of the High Court in Malaya at Ipoh, whereby it gave judgment for the plaintiff against the defendants for 25,930 dollars. The trial judge found that he had been guilty of contributory negligence, and therefore awarded him only 50 per cent. of the damages. The law as to contributory negligence is, by statute, the same as in this country. The grounds of appeal are that the learned judge should not have found on the evidence that the plaintiff was guilty of any negligence, or if he did find him guilty of negligence, he should not have estimated its amount at so high a figure as 50 per cent.

The plaintiff was travelling on a motorcycle along the main road, and into that road, on his nearside, ran a lane down which, unknown to him, a lorry was proceeding. About 10 ft. back from the place where the lane entered the main road a van was drawn up by the side of the road and partly on the verge, leaving about 4 ft. or so